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Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-2033

STATE OF ALABAMA, ET AL,

Petitioners

VERSUS

N. H. NEWMAN, ET AL,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM J. BAXLEY
Attorney General of Alabama

GEORGE BECK
Deputy Attorney General

WALTER S. TURNER
Chief Assistant Attorney General

LARRY R. NEWMAN
Assistant Attorney General

HERBERT H. HENRY
Assistant Attorney General

ATTORNEYS FOR PETITIONERS
250 Administrative Building
64 North Union Street
Montgomery, Alabama 31604

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, State of Alabama; Bill Baxley, Attorney General for the State of Alabama; Colonel Glen Thompson, Medical and Diagnostic Center, Mt. Meigs, Alabama; Frank B. Brown, Hospital Administrator and/or Business Manager, and all hospital staff, Medical and Diagnostic Center, Mt. Meigs, Alabama; the Alabama Board of Corrections; L. B. Sullivan, individually and as Commissioner of the Alabama Board of Corrections; Yetta G. Samford, Jr., individually and as Chairman of the Alabama Board of Corrections; and Dr. Max C. McLaughlin, Reverend John E. Vickers, Dr. Thomas F. Staton, and W. T. Thrash, individually and as members of the Alabama Board of Corrections, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on November 8, 1974.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Alabama ordering extensive injunctive relief be undertaken by the petitioners with respect to all aspects of medical treatment in the Alabama Prison System is reported at 349 F. Supp. 278. The Opinion of the Court of Appeals for the Fifth Circuit which affirmed the judgment of the District Court for the Middle District of Alabama is reported at 503 F. 2d 1320, and is set out in the Appendix, at page 24.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 8, 1974. A timely petition for rehearing and suggestion of appropriateness for rehearing en banc was filed and was denied by order of the court on January 10, 1975. The Court of Appeals, on January 27, 1975, stayed its mandate to and including February 26, 1975.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court below err in its conclusion that this case did not require the convening of a three-judge court under the provisions of 28 U.S.C. 2281? In so holding, did it err further in holding that the granting of the requested relief will not eviscerate any regulations governing medical care or affect any state statute?

2. Did the Court below err in its conclusion that expert testimony based on disputed evidence in the case was admissible under 43(a) FRCP, when both state and federal rules do not favor admission of such testimony?

3. Did the Court below err in holding that a federal court has the authority to evaluate the adequacy of the entire medical delivery system of a state prison system? In so holding, did the Court below err in holding that the ordered institutioning of specific standards of medical care incorporated in the injunctive relief ordered was not beyond the remedial power of a federal court? More particularly, did it err further in holding that the required elevation of the prison hospital to meet the *Proposed Revised Regulations for Participation of Hospitals and Medicare* was imposed only when petitioners were remiss in submitting proposed standards requested by the court at the termination of the evidentiary hearing?

STATEMENT OF THE CASE

This case was initiated on October 28, 1971, by the filing of an *in forma pauperis* complaint by N. H. Newman, an inmate of the Alabama Penal System. Said complaint was filed on behalf of himself and other prisoners of the prison system. Newman alleged that the medical treatment afforded prisoners at the Prison System Hospital at Mt. Meigs was not adequate. The defendants named were the State of Alabama, the Attorney General of Alabama, Warden of Mt. Meigs, and also made parties defendant, but not named specifically, were the hospital staff of the Medical and Diagnostic Center.

Defendants filed a motion to dismiss the complaint; said motion being denied on January 11, 1972.

The Court designated the United States as Amicus Curiae on November 19, 1971.

On January 12, 1972, the Court appointed an attorney to represent the plaintiffs and directed that to the extent practical the case was to be submitted on depositions.

A pretrial hearing was held on February 15, 1972, and the issues in the case were expanded to include medical treatment and care throughout the entire prison system. Additionally, the Alabama Board of Corrections and its individual members were joined as parties defendant.

Trial on the merits was begun on March 27, 1972, and concluded on March 29, 1972.

On October 4, 1972, the opinion and decree of the District Court was rendered ordering, among other things, that the defendants be enjoined from refusing to provide adequate medical care to each inmate in the Alabama Prison System, and also ordering the implementation of certain specific standards (U.S. Department of Health, Education, and Welfare *Proposed Revised Regulations for Participation for Hospitals and Medicare Program* of January 17, 1972). Also, the court ordered that the defendants conduct a survey of the entire correctional system and to file with the court within 90 days proposed minimum staffing for each of the facilities operated by the defendants. This survey in staffing proposals was to include psychiatrists, psychologists, and persons dealing with mental health care.

On October 14, 1972, motion for new trial was filed by the appellants. On October 17, 1972, said motion for new trial was denied.

On November 9, 1972, notice of appeal was filed.

On November 3, 1972, defendants filed a motion seeking to have the court hold in abeyance sums taxed against the defendants as attorneys' fees and expenses pursuant to the Order of October 4, 1972. Said Motion was granted and said funds have been placed in an interest bearing account until final disposition of this cause.

On April 22, 1974, the case was argued before the United States Court of Appeals for the Fifth Circuit.

On August 6, 1974, the Clerk of the United States Court of Appeals for the Fifth Circuit notified counsel that the court had determined to consider the question of the allowance of attorneys' fees against the state, state officers, or both, in view of the Eleventh Amendment (*Edelman v. Jordan*, 1974, —— U.S. ——, 39 L. Ed. 2d 662) at its en banc session on October 1, 1974. Subsequently, on September 9, 1974, all issues in the case *sub judice* were placed before the court en banc. Argument before the court en banc on the question of attorney's fees[1] had been set for argument before the court on October 2, 1974. Subsequently, on the first of October, 1974, counsel was notified that the court at its en banc session of the second of October, 1974, would hear argument on the merits of the case if counsel so desired. At oral argument on the second of October, all counsel participating in the case *sub judice* agreed to submit on brief previously filed.

On November 8, 1974, the decision of the United States Court of Appeals for the Fifth Circuit was issued affirming the judgment of the district court except for the question of attorneys' fees.

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[1]The issue of attorneys' fees is not an issue in the case **sub judice.**

The Alabama Board of Corrections at the time of the district court hearing operated five major prisons: (1) Draper Prison—867 inmates, (2) Tutwiler Prison (women)—117 inmates, (3) Mt. Meigs Medical & Diagnostic Center —331 inmates, (4) Atmore Prison Farm—1,022 inmates, and (5) Holman Prison—677 inmates.

Loated at Mt. Meigs is the Medical and Diagnostic Center M & DC) of the Board of Corrections. The M & DC receives for treatment all prisoners in the system who require general hospitalization, treatment and diagnosis. At the other four institutions, infirmaries are maintained for medical treatment requiring less extensive care.

At the time of the hearing, a physician, who was employed forty hours per week at M & DC, had just resigned and two local physicians who were partners in private practice were retained by the Board of Corrections to hold daily sick call and make rounds every day in the hospital. These physicians were on call 24 hours per day. Additionally, there is a T.B. specialist who handles all T.B. cases, a surgeon who performs all surgery for the Board of Corrections, an internal medicine specialist, and a dentist, all of whom are employed by the Board of Corrections and who service M & DC. All physicians are permitted to consult with any specialist whenever they wish.

The registered nurses employed at the M & DC provide continuous coverage from 7:00 a.m. to 11:00 p.m. One nurse comes in for several hours on Saturdays and Sundays.

MTA (medical technical assistants) coverage of the M & DC hospital is provided 24 hours per day, seven days a week. MTA's dispense medication ordered by physicians, report any

abnormal findings they observe during their shift, make periodic notes on charts, administer shots and I.V.'s

An intensive care unit is not maintained at M & DC. In the event a patient becomes critically ill and needs a constant monitoring or specialized medical care not available at the M & DC, he is transferred to a local hospital.

As stated previously, the other institutions maintain small infirmaries. At the time of the hearing, sick call was held at Draper Prison at least three mornings a week. If a patient's illness is not severe, he is placed in the infirmary. A doctor is on call at Draper 24 hours a day, seven days a week.

At Tutwiler, sick call is conducted by a local physician five days a week. This physician is also on call 24 hours a day.

Holman Prison has an eight-bed infirmary. The average number of patients at any one time is usually three. At the time of the hearing, a physician conducted sick call at least three days a week. Emergencies are sent to M & DC or to a local hospital.

Atmore Prison Farm also maintains an infirmary. The same physician who services Holman also sees patients at Atmore.

At the district court hearing on the merits plaintiffs introduced fifty-three depositions into evidence and adopted the testimony presented by the expert witnesses brought in by the United States (amicus curiae). The depositions referred to were mostly those of inmates in the system but also

included seven medical doctors who were or are currently employed by the Board of Corrections and of other medical personnel employed by the prison system.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to review the holding of the Court below wherein it held that this case did not require the convening of a three-judge court under 28 U.S.C. 2281, since in so holding the Court failed to recognize that the granting of the requested relief effectively disrupted the authority of the Alabama Board of Corrections to promulgate rules and regulations authorized by Alabama law.

Although not raised by either party, the district court, or amicus curiae, the Court of Appeals presented sua-sponte the question of whether or not a three-judge court should have been convened. *Calero-Toledo v. Pearson Leasing Company*, —— U.S. ——, 94 S.Ct. 2080, 40 L. Ed. 2d 452, 460 (1974); *Kennedy v. Mendoga Martinez*, 372 U.S. 144, 153, 83 S.Ct. 554, 9 L. Ed. 2d 644, 652 (1963); *Sands v. Wainwright*, 491 F. 2d 417, 424 (5th Cir. 1973), Cert. den., sub. nom. *Guajardo v. Estelle*, ——, U.S. ——, 94 S.Ct. 2403, 40 L. Ed. 2d 771 (1974).

In its opinion, however, the Court of Appeals held that a three-judge court was not required.

As the opinion below notes, Title 45 §§3,4, Code of Alabama, 1940, authorizes the Alabama Board of Corrections to promulgate rules and regulations concerning the sanitation, health, and hygiene of the general inmate population and concerning inmates for whom long-term medical confinement is necessary (Slip Opinion p. 784).

In *Sands v. Wainwright*, 491 F.2d 417 (5th Cir. 1973), Cert. den. *Guajardo v. Estelle*, —— U.S. ——, 94 S. Ct. 2403, 40 L. Ed. 2d 771 (1974), the Fifth Circuit referred to the criteria establishing the necessity for a three-judge court under 28 U.S.C. 2281:

(1) That the statute or administrative order in question be of statewide significance.

(2) That injunctive relief be sought and, in fact, ordered.

(3) That the constitutional attack on the statute not be insubstantial.

Applying such criteria to the case *sub judice*, the following conclusions result:

(1) STATEWIDE SIGNIFICANCE

The two Alabama statutes referred to are of statewide significance. One relates to the Alabama Board of Corrections' general authority to "manage, supervise, and control all penal and correctional institutions . . . and [T]o promulgate such rules and regulations necessary to hygiene, sanitation, cleanliness, healthfulness . . . of all prisons and jails."[2]

The second relates to the department's authority to make "arraignments with reference to the segregation and treatment of tubercular patients, and other patients needing long-term hospital detention and care."[3] This statute further provides: "Any such hospital or hospitals, or other places *suitable* and used under the convict system for . . . treatment

[2]Title 45, §3, supra.
[3]Title 45, §4, supra.

of tubercular or long-term patients may be opened under the authority of the . . . department . . ." "The department is given general authority over the reception, care, custody . . . of such persons, and is also vested with the power and authority, by and with approval of the Governor, to establish and promulgate rules and regulations for the proper conduct of the business and operation of such hospitals."

Thus rules and regulations pertaining to the overall medical treatment of prisoners, in the state-wide Alabama Prison System,[4] and the rules and regulations pertaining to the operation of hospitals for tubercular and long-term patients[5] are of state-wide significance.

(2) INJUNCTIVE RELIEF SOUGHT AND ORDERED

Newman's complaint was filed pro se. He asked for relief in a general sort of way. However, there is no doubt that prior to the trial of this case that injunctive relief was sought[6] and ordered.

(3) THE CONSTITUTIONAL ATTACK IS NOT INSUBSTANTIAL

The Court below in its opinion acknowledged that the "challenge registered herein is unprecedented in scope", and "evokes an evaluation of systemic medical deficiencies." (Slip Opinion p. 795). Appellants can find no prior decision of this Honorable Court measuring the "adequacy" of medical treatment on a constitutional basis. Certainly not where there is an obvious difference of opinion between medical expert witnesses.[7]

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[4]Title 45, §3, supra.
[5]Title 45, §4, supra.
[6]Title 45, §2(b) of the Order of Pretrial Hearing (R.P. 26).

The Court below in holding that §2281 was not required to be invoked reached this conclusion by distinguishing the case *sub judice* from the *Sands* case,[8] particularly, *Baker v. Estelle.*[9]

The first distinction drawn is that there is a "slight qualitative distinction between the . . . disciplinary procedures and mail censorship practices attacked in *Baker v. Estelle,* and the calibre of medical care attacked by inmates of the APS." Slip Opinion, p. 786).

The Court further stated that the "APS is not governed by any uniform practice . . . beyond the purported uniform practices of neglectful treatment . . .". " . . . In this respect, the medical conditions were not susceptible to codification in the form of regulations." (Slip Opinion p. 786).

We most respectfully disagree with the Court of Appeals' distinctions. In *Baker v. Estelle,* 491 F.2d 417, 428 the Court of Appeals held that if constitutionally defective statutes are found to exist, new regulations must be mandated in order to assure present "practices" will not be continued. In the very next paragraph, the Court then stated that if the plaintiffs' relief was to be granted in that case, the court "would have to insist that new regulations be instituted . . ."

Thus, in *Baker v. Estelle,* supra, the fact that "more complete and more specific regulations" were to be mandated in order to insure present unconstitutional "practices" not continue required imposition of a three-judge court.

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[7]There was no allegation, proof by competent testimony, nor finding by the court of an incident of malpractice on the part of any physician employed by the Alabama Prison System.

[8]491 F. 2d 417 (5th Cir. 1974)

[9]491 F. 2d 428 (5th Cir. 1974)

In the case *sub judice*, the District Judge stated in his opinion:

> "When practices within a prison system result in the deprivation of adequate medical treatment, then such practices violate constitutional guarantees and federal courts must act to provide relief." (R. pp. 68, 69).

The expansive mandatory and injunctive relief ordered by the District Court is essentially the instituting of the "new regulations" and enjoining of further enforcement of present regulations which has been held to be reserved by three-judge courts under §2281. Indeed, the implementation of the one hundred and thirty nine pages of the *Proposed Revisions of Regulations Covering Participation of Hospitals in Medicare* ordered by the District Court speaks for itself as being the type of "regulations"[10] mandated to prevent continuation of "present practices."

The second difference the Court below found, i.e., that the decision will not eviscerate any regulations governing medical care in the APS, is, we respectfully submit, incorrect. The Court of Appeals' decision in *Baker v. Estelle*, supra, did not actually eviscerate the rules and regulations in that case, it called for "more complete and more specific regulations" to stop unconstitutional "practices". That is exactly what has been ordered in the case at bar: complete and specific regulations to stop alleged unconstitutional practices.

What is common to both *Baker v. Estelle*, supra, and the case *sub judice* is that an injunctive sanction has issued against the application of the state-wide rules and regulations as they existed; that pending review, the APS has not

[10]Title 45, §4, supra.

been free to continue to apply the rules and regulations as they existed and that the operation of the statutory scheme of both applicable state statutes (Tit. 45, §§ 3,4, supra) was disrupted immediately upon the entering of the order of the district judge.

This is exactly the type of injunctive relief this court referred to in *Kennedy v. Mendoga-Martinez*, 372 U.S. 144, 9 L.Ed. 2d 644, 83 S.Ct. 554 (1963), wherein the court stated that 28 U.S.C. 2281 was enacted "to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order." "The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative police". This Court then went on to say that the purpose of Congress in enacting the statute was "to provide for the convocation of a three-judge court whenever the operation of a statutory scheme may be immediately disrupted before a final judicial determination of the validity of the trial court's order can be obtained." 372 U.S. 144, 154, 155, 9 L.Ed.2d 644, 653.

To further illustrate this point, one need only consider whether the APS could, after the order of the District Court on October 2, 1972, promulgate any rules and regulations under Title 45, §§3,4, supra, which were contrary to or inconsistent with the court's order. Indeed, it is questionable whether the Alabama Board of Corrections could promulgate any rules and regulations under Title 45, §§3,4, supra, without the prior approval of the district judge. Surely, this is the type of case Congress contemplated when it passed 28 U.S.C. 2281.

II.

Certiorari should be granted to review the holding of the

Court below wherein it held admissable under 43(a) FRCP, the opinion of the Respondents' expert witness as to the adequacy of medical treatment where such testimony was based on disputed evidence in the case.

The Court below disposed of the evidentiary rulings which appellants contended were erroneous citing 43(a) FRCP.

Petitioners submit that the Court of Appeals was mistaken in its conclusion that the trial court correctly permitted Doctor Alderete, the expert witness, to state his opinion as to the adequacy of medical care where he based his opinion on disputed evidence in the case.

In *Dexter v. Hall*, 89 U.S. 9, 15 Wall 9, 21 L.Ed. 73, (1873) this Honorable Court held that a medical expert may be asked his opinion on a case hypothetically stated, or on a case where facts are certain and found; but he will not be allowed to determine by the evidence what the facts are and to give his opinion upon them.

At the early part of Doctor Alderete's testimony, counsel for the United States stated that Doctor Alderete "looked at medical records and has read testimony taken in depositions, from which he will also testify". (Appendix, Court below, p. 2596).

During the course of his testimony on direct, the doctor was asked if he "*heard* of instances when inmates who were sent from other institutions to Mt. Meigs for medical care did in fact not receive care or that care was inadequate?" (Appx. pp. 2606, 2607) (emphasis supplied). Objection was timely made and overruled and the doctor responded, "Yes, I did". (p. 2607). Later during direct examination, Doctor Alderete was asked, "is the level of care afforded at the

M & DC hospital medically adequate?" (p. 2617). Objection was made and overruled and the doctor then stated, ". . . with all these deficiencies suggests that the medical care was inadequate . . ." (p. 2617). Again, he was asked "is the level of care at Mt. Meigs medically inadequate, inacceptable?" (p. 2617). Objection was again overruled and the doctor answered "Yes". (p. 2618).

Alderete's testimony was inadmissable under both state[11] and federal[12] rules of evidence. Consequently, the holding of the Court below that such testimony was admissable is erroneous.

III.

Certiorari should be granted to review the holding of the Court below that a federal court has the authority to evaluate the adequacy of the medical delivery system of the state prison system where such evaluation must of necessity be based solely on professional medical opinion.

Additionally, certiorari should be granted to review the holding of the Court below that the ordered institution of specific standards of medical care by the district court was not beyond the remedial power of a federal court.

Petitioners submit that the question of adequacy and propriety of medical treatment and care of inmates in the Alabama Prison System is not properly within the jurisdiction of federal courts. The determination of such question necessarily requires delving into scope and extent of said medical treatment and care.

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[11]**Parish v. Alabama**, 139 Ala. 16, 36 So. 1012; **Ex parte Gunter**, 83 Ala. 96, 3 So. 600; **Porter v. State**, 135 Ala. 51, 33 So. 694.

[12]**Dexter v. Hall**, supra; **U.S. v. Michener**, 152 F.2d 880 (3rd Cir. 1945).

Adequacy of medical treatment is a matter of professional medical opinion or an institutional administrative matter with which federal courts should not interfere. *Oaks v. Wainwright*, 430 F.2d 241 (5th Cir. 1970); *Cates v. Ciccone*, 442 F.2d 926 (8th Cir. 1970). This is amply illustrated by substantial conflicting medical testimony in this case as to the adequacy of medical care at Mt. Meigs Medical and Diagnostic Center. An outside physician testified that medical records did not, in his opinion reflect adequate medical care (pp. 2617, 2741). However, physicians who practiced at Mt. Meigs felt that the medical care was adequate. (Plaintiffs' Exhibits #27, deposition dated Feb. 23, 1972, p. 71; #28, p. 19; #29, p. 15 #32, p. 52; #30, p. 13).

Indeed, the Court below narrowly limited the scope of review in cases such as the case at bar. In *Novak v. Beto*, 453 F.2d 661 (5th Cir. 1971) the Court of Appeals stated:

> ". . . The scope of our review is very limited under the cruel and unusual clause. And there are good reasons for limitations on the scope of that review. In the first place we are simply not qualified to answer many difficult *medical*, psychological, sociological, and correctional questions *when it comes to choosing between one form of treatment and another.* It is for this reason, we think, that courts have traditionally confined their review of prison regulations to such standards as "barbarous" and "shocking to the conscience . . . " (emphasis supplied).

See also: *Hyde v. McGinnis*, 429 F.2d 864 (2nd Cir. 1970).

However, the order of the district court in the case *sub judice* holds, in effect, that prison officials have no discretion in this area. The decree not only requires the Ala-

bama Prison System to provide basic, necessary, care of constitutional dimensions, but also decides what type and quality of care is to be given.

In *Novak v. Beto*, supra, the Fifth Circuit Court of Appeals stated:

> "More important, however, we think that it is more apparent in this case, if it had not been apparent before, that courts simply are not equipped to police the prisons."

Also in footnote 6 found at 453 F.2d on page 671, the Court of Appeals further stated:

> "The limits of our ability to police the prisons manifest itself in various ways. One of course is the fact that prison reform is primarily a task for legislators and administrators. We cannot express this point better than did Judge Kaufman in *Sostre v. McGinnis*, supra, 442 F.2d at 205:
>
> "We do not doubt the magnitude of the task ahead before our correctional systems become acceptable and effective from a correctional, social and humane viewpoint, but the proper tools for the job do not lie with a remote federal court. The sensitivity to a local nuance, opportunity for daily perseverance, and the human and monetary resources required lie rather with the legislators, executives, and citizens in their communities".

The Court below stated in its opinion:

> "it is axiomatic that the remedial power of a district

court is coterminous with the scope of the constitutional violation found to exist." (Slip Opinion p. 797).

Yet the court found that the elevation of the hospital at Mt. Meigs, the central hospital for the entire prison system, to the standards enunciated in the *Proposed Revised Regulations for Participation of Hospitals in Medicare* was permissable.

These regulations (U.S. Exhibit No. 7) are one hundred and thirty nine (139) pages of extremely detailed and technical regulations for operation of hospitals. The implementation of these regulations are anything but "coterminous with the scope of the constitutional violation found to exist." They include regulations in areas in which even the United States medical expert, Doctor Alderete, found no inadequacies:

1. Physical plant (App. p. 2729).
2. Equipment (App. p. 2730).
3. Medical Supplies (App. p. 2730).
4. Nutritious food (App. p. 2731).

The Court below in its opinion acknowledged the specificity of the medicare standards but held that they were "imposed only when appellants were remiss in submitting proposed standards requested by the court at the termination of the evidentiary hearing". (Slip Opinion P. 796).

The district judge in his opinion and decree did not refer to any failure on the part of petitioners to submit such proposals. In fact the first mention of this subject was made by the United States amicus curiae in its brief filed on the merits in the Court below.

It affirmatively appears that the trial judge made a request of the plaintiffs and amicus curiae that they submit

proposed standards along with their post-trial briefs. (Appx. p. 2856). No such request was made of petitioners and counsel for petitioners never understood that such was the intention of the trial judge. It would be entirely ludicrous for petitioner to submit proposed standards for medical care of inmates when that very issue was still undecided and still in the breast of the trial court.

Simply stated: Why would a judge in an equity case require the defendant to submit his proposal on how to implement requested relief when the court has yet to decide whether relief is in fact warranted?

To hold that appellants were remiss in failing to submit such standards certainly cannot be equated with the "total default" found in *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1275, 28 L.Ed. 2d 554 (1971). The Court below erroneously concluded that petitioners were remiss in failing to submit such "standards".

The ordered implementation of the H.E.W. standards goes far beyond the remedial power of the district court. Certainly, it is not "coterminous with the scope of the constitutional violation found to exist." Injunctions must be tailored to remedy the specific harms shown rather than to "enjoin 'all possible breaches of the law.'" *Davis v. Romney*, 490 F.2d 1360 (3rd Cir. 1974). "The remedial power of an equity court must be adequate to the task, but they are not unlimited". *Whitcomb v. Chavis*, 403 U.S. 124, 161, 29 L. Ed. 2d 363, 386, 91 S.Ct. 1858 (1971).

This Honorable Court in *Procunier v. Martinez*, —— U.S. ——, 94 S.Ct. 1800, 40 L. Ed. 2d 224 (1974), stated:

"[T]he problems of prisons in America are complex

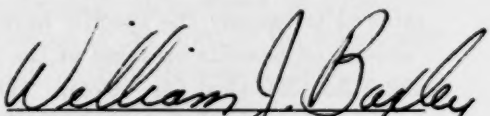
and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. 40 L. Ed. 2d 224, 235, 236.

The question of whether a federal court may take an alleged constitutional infirmary and fashion it into an instrument of prison reform is properly an issue for certiorari.

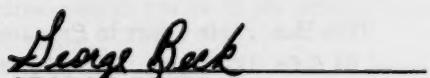
CONCLUSION

For the reasons stated, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



WILLIAM J. BAXLEY
Attorney General of Alabama



GEORGE BECK
Deputy Attorney General

WALTER S. TURNER
Chief Assistant Attorney General

LARRY R. NEWMAN
Assistant Attorney General

HERBERT H. HENRY
Assistant Attorney General

Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 31604
ATTORNEYS FOR PETITIONERS

APPENDIX A

ORDERS, PLEADINGS AND OTHER PAPERS ESSENTIAL TO UNDERSTANDING OF CASE

N. H. NEWMAN et al., Respondents-Appellees,

v.

STATE OF ALABAMA and Bill Baxley, Attorney General for the State of Alabama, Petitioners-Appellants, United States of America, Amicus Curiae.

No. 73–2033.

United States Court of Appeals, Fifth Circuit.

Nov. 8, 1974.

State prisoners brought class action for declaratory and injunctive relief based on claim that they were deprived of proper and adequate medical treatment in violation of their rights guaranteed under Eighth and Fourteenth Amendments to the United States Constitution. The United States District Court for the Middle District of Alabama, at Montgomery, Frank M. Johnson, Jr., Chief Judge, 349 F.Supp. 278, ordered that extensive relief be undertaken, and State and its Attorney General appealed. The Court of Appeals, after placing the cause en banc, remanded the cause to the panel, —— F.2d ——. The panel, Gewin, Circuit Judge, held that this litigation was appropriately disposed of by a single-judge district court and did not compel the convening of a three-judge court, that no evidentiary errors were committed, and that district court's finding of a constitutional violation could be sustained.

Affirmed in part.

1. Appeal and Error ⇐185(1)

Issue whether a three-judge court should have been convened to adjudicate merits of prisoners' challenge to quality of medical care dispensed to inmates incarcerated in state penal

Synopses, Syllabi and Key Number Classification
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INDEXED

system was jurisdictional, and thus the Court of Appeals was required to consider it, despite failure of parties to introduce it at any previous stage in the litigation. 28 U.S.C.A. § 2281.

2. Courts ⇐101.5(4)

Prisoners' challenge to quality of medical care dispensed to inmates incarcerated in state penal system was appropriately disposed of by a single-judge district court, and did not compel convening of a three-judge court, where state penal system was not governed by any uniform practice, or procedure in administration of medical care, beyond the purported uniform practices of neglectful treatment dispensed at the various prison locations throughout the state, and a decision granting requested relief would not eviscerate any regulations governing medical care in state penal system. 28 U.S.C.A. § 2281; Code of Ala., Tit. 45, §§ 3, 4.

3. Courts ⇐101.5(7)

Rule that three-judge court status is to be determined from allegations appearing on the face of a complaint is not an intractable one, and may accede to jurisdictional command of three-judge court statute. 28 U.S.C.A. § 2281.

4. Prisons ⇐4

Courts must be wary to avoid obtrusively monitoring conduct of prison officials and thereby encumbering the administration of prison affairs.

5. Prisons ⇐4

The Court of Appeals' function in passing upon prison complaints is limited, but the court will not be impervious to need to fetter prison officials where constraints are constitutionally appropriate. U.S.C.A.Const. Amends. 8, 14.

6. Criminal Law ⇐1213

Under cruel and unusual punishment clause of Eighth Amendment, courts confine their inquiry, inter alia, to whether conditions of confinement shock the conscience, are greatly disproportionate to the offense, or offend evolving notions of decency. U.S.C.A.Const. Amend. 8.

7. Prisons ⇐17

Courts will not tolerate serious shortages in medication at prisons.

8. Constitutional Law ⇐272
Criminal Law ⇐1213

Evidence as to the shortage of qualified medical personnel in state penal system, the referral and emergency procedures employed, the shortages in drug supplies, the unavailability of eyeglasses and prosthetic devices, the employment of obsolete medical equipment and techniques, the disorganized lines of therapeutic responsibility, and the glaring unhygienic conditions warranted findings of constitutional inadequacy under either Eighth Amendment's prohibition against cruel and unusual punishment or the due process clause. U.S.C.A.Const. Amends. 8, 14.

9. Prisons ⇐4

Existence of constitutional infirmities deprives prison deference rule of its indomitably insulating nature and dictates that the rule yield to remedial power of a court.

10. Prisons ⇐4

Remedial power of a district court is coterminous with scope of constitutional violation found to exist at prison.

11. Prisons ⇐17

Measures required by district court to improve quality of medical care dispensed to inmates incarcerated in state penal system was within province of the district court, and did not transgress principle that courts should not intrude into matters related to prison administration.

12. Prisons ⇐4

The Court of Appeals will not expect or demand alchemy of prison officials, but will insure that plight of inmates is not constitutionally forsaken. U.S.C.A.Const. Amends. 8, 14.

Appeal from the United States District Court for the Middle District of Alabama.

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

GEWIN, Circuit Judge:

This appeal emanates from a district court order, reported at 349 F.Supp. 278 (M.D.Ala.1972), sustaining a challenge to the quality of medical care dispensed to inmates incarcerated in the Alabama Penal System (APS). While laboring arduously and meticulously to implement the extensive relief mandated by the district court in the interim between that decree and oral argument before this court, appellants nevertheless raise numerous evidentiary objections, contest the finding of a constitutional violation as erroneous, and dispute the authority of a federal court in fashioning remedial relief to dictate medical standards which must be implemented.[1]

1. Appellants also challenge the district court's award of attorneys' fees and expenses to appellees' court-appointed counsel. After oral argument to a panel of this court, the court sua sponte placed this case, Named Individual Members of San Antonio Conservation Society v. Texas Highway Dept., 496 F.2d 1017 (5th Cir. 1974), and Gates v. Collier, 489 F.2d 298 (5th Cir. 1973) en banc for consideration. In the *San Antonio* case the only issue reserved by the court for en banc consideration was the issue of awarding attorneys' fees in light of the Eleventh Amendment and Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). Decision on the merits was retained by the original panel and was not placed before the court en banc for consideration. In Gates v. Collier there were two separate decrees of the district court, one on the merits, 349 F.Supp. 881 (N.D.Miss.1972), which has now been affirmed, 501 F.2d 1291 (5th Cir. 1974); the other decision of the district court dealing with the issue of the award of attorneys' fees and expenses, 371 F.Supp. 1368 (N.D.Miss.1973), is now pending before the court en banc.

All issues in the case *sub judice* were placed before the court en banc by order of the court filed September 9, 1974. Counsel were afforded an opportunity to argue the merits, but it was conceded by all that the most disturbing issue in the case was the assessment of attorneys' fees and expenses in view of the decision in Edelman v. Jordan, *supra*, and the provisions of the Eleventh Amendment. At oral argument en banc counsel did not argue the merits but limited their argument to the question of attorneys' fees and expenses. After submission of the case to the court en banc, the court on the 16th day of October 1974 amended its order of September 9, 1974 to reserve to the court en banc only the question of the allowance of attorneys' fees and expenses. The appeal concerning the merits of

Our en banc opinion in Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973), cert. denied, Guajardo v. Estelle, —— U.S. ——, 94 S.Ct. 2403, 40 L.Ed.2d 771 (1974), prompted consideration, sua sponte, of whether the issues presented in this case were appropriate for disposition solely by a three judge court. Concluding that appellants' contentions cannot be sustained, and that the three judge court act, 28 U.S.C. § 2281, does not pose a jurisdictional impediment to the result obtained below, we affirm.

I

This class action litigation was initiated by the filing of a pro se complaint, designating the State of Alabama and various named individuals including the State Attorney General and the Warden of the Mt. Meigs Medical & Diagnostic Center (Mt. Meigs) as defendants.[2] The original complaint chronicled examples of patient neglect transpiring at Mt. Meigs, one of several institutions in the APS. After granting the request of the United States to appear as amicus curiae and appointing counsel to appear on Newman's behalf, the district court, in a pretrial order, extended the scope of the challenge registered from merely the shortcomings at Mt. Meigs to the inadequacies prevalent in the state system as a whole. In addition, it ordered further discovery procedures, pursuant to which a multitude of interrogatories and depositions were taken, and voluminous hospital records were subpoenaed. The facts recounted in this opinion are distilled from the information produced by these procedures and the evidentiary hearing at which this information was admitted into evidence.

. the case was remanded to the original hearing panel composed of Judges Gewin, Thornberry and Simpson.

2. The complaint was filed on October 28, 1971. In a February 15, 1972 order, Judge Johnson granted Newman's motion to add as parties defendant the Alabama Board of Corrections, its Commissioner, its Chairman, and 4 members.

The APS contains 5 major prisons which house several thousand inmates: (1) Mt. Meigs with 331 prisoners; (2) Holman with 677 prisoners; (3) Atmore with 1,022 prisoners; (4) Draper with 867 prisoners; and (5) Julia Tutwiler with 117 female prisoners. Additionally, the state operates 13 prison road camps which house 737 prisoners, the state Cattle Ranch which houses 25 prisoners, and the Frank Lee Youth Correctional Center in which 73 prisoners are incarcerated. Each facility is beset by certain deficiencies, though to different degrees.

The most critical infirmity, from which no institution has escaped, is insufficient staffing. Although a paragon of quality when compared to the other institutions, Mt. Meigs, which serves as the central receiving unit and the general hospital and diagnostic center for the entire system, was staffed only by 2 physicians whose consolidated efforts replaced one full-time physician, 3 registered nurses, 8 medical technical assistants (M.T.A's), 1 lab and x-ray technician, and 1 pharmacist. It lacked a hospital administrator, a dietician, a medical records clerk, and a psychiatric consultant.[3] Moreover, because the registered nurses worked a standard week, on the weekends and at night inmates would be attended only by M.T.A's and inmate assistants, neither of which are technically qualified medical personnel. The personnel shortages at the other institutions were more severe. Draper, for example, was staffed only by 1 M.T.A. and inmate assistants. A

3. Mt. Meigs did employ a tuberculosis specialist and one surgeon, both of whom came to the facility once a week, and in addition, the surgeon was "available when needed." Mt. Meigs also had the services of a clinical psychologist for 1 afternoon per week, who devoted a comparable amount of time to Draper and Tutwiler.

The staffing shortages could have been mitigated if the legislature had authorized a larger budget beginning with fiscal year 1971. At the evidentiary hearing, John Braddy, the Correctional Plans Coordinator and Personnel Officer for the Board of Corrections, testified that the Board had created 14 positions throughout the APS which had remained vacant as a result of inadequate funding. Ten of these vacancies were for M.T.A.'s, 3 for doctors, and one for a clinical psychologist, all to be utilized throughout the system.

licensed practical nurse worked a dayshift at Tutwiler. Atmore was serviced by 3 M.T.A's, a part-time dentist, and a contract physician who conducted sickcall 5 days a week. Holman was similarly staffed by 3 M.T.A's unavailable on weekends, a part-time dentist and a contract physician who made 3 visits per week for two hours at a time. Neither the road camps, the Cattle Ranch, nor the Youth Correctional Center was staffed by any medical personnel.

The deleterious consequences predictably occasioned by these shortages can be summarized as follows. First, it is necessary that unsupervised inmate assistants administer treatment and medication, take x-rays, give injections, and perform suturing and minor surgery on patients. Second, medical records are incomplete, inaccurate and not standardized. Third, and in conjunction with the latter deficiency, lines of therapeutic responsibility, if any exist, are poorly organized with the result that both doctors and their subordinates are often unaware of their responsibilities with respect to particular patients.[4] Finally, emergency patients at Mt. Meigs are, as the medical records of several inmates reveal, left unattended for protracted periods of time.

Beyond staff deficiencies, the institutions suffer from unsanitary conditions. For example, although Mt. Meigs contains separate wards for tuberculosis and hepatitis patients, soiled linens and dishware from these wards are cleansed in the same area as the linens and dishware of the general ward population, a fact which heightens the potential for contagion. At one of the institutions, a whirlpool was discontinued due to a "lack of adequate material to clean [the] pool for staph

4. The consequences of inadequate medical records are manifest in two ways. First, because inmates transferred to and released from Mt. Meigs are accompanied by paltry records, personnel at the receiving institutions are unaware of the diagnosis, treatment previously rendered, and the treatment prescribed for the future. Second, there can be little or no monitoring of whether receiving facilities are complying with a physician's orders. Indeed, the evidence indicates that such noncompliance is rampant.

infection." Moreover, the physical plants of some of the facilities, particularly Draper and Julia Tutwiler, were in such a state of disrepair that sanitary conditions were jeopardized.

Assessments of the quality and quantity of medical supplies varied from institution to institution. For example, Dr. Joseph Alderete, the Hospital Director for the U. S. Penitentiary Hospital in Atlanta, Georgia, who conducted a survey of medical care in the APS, maintained that the drug supply at Mt. Meigs was adequate although some of the drugs administered were obsolete. At other institutions, chronic shortages were claimed to exist. Moreover, one institution was known to have employed rags and towels in lieu of gauze, the supply of which had been depleted.

The institutions generally also suffered from the existence of either ill-serviced or anachronistic equipment and medical procedures. For example, Tutwiler, the women's institution, employed drip ether as an anesthetic in delivery operations, despite estimates that this method had not been used after 1953. Dental equipment at several of the facilities was generally characterized as outmoded. Moreover, witnesses related instances of x-ray machines that were not monitored for leakage and hence were potential sources of radiation exposure.

Witnesses identified numerous other foibles, including the absence of ambulances at the institutions, the lack of established procedures for fire emergencies, the existence of interminable delays in effecting medical referrals to Mt. Meigs and, in individual cases, in filling requests for eyeglasses and prosthetic devices, and the inadequacy of facilities for geriatric inmates.

Finally, despite an estimate by Dr. Mracek, Medical Director of the Board of Corrections, that approximately one-third of the inmate population suffers from mental retardation, and an assessment by Dr. Alderete that 60 percent of the inmates are disturbed enough to require treatment, the APS provides only nominal assistance to mentally ill inmates. At

the time this suit was filed, the Board of Corrections employed one clinical psychologist who devoted one afternoon per week to disturbed inmates at Mt. Meigs and spent an equally limited amount of time at Draper and Tutwiler. No psychiatrists, social workers or counsellors were employed in the system. Additionally, obstreperous inmates were often placed in the general population and when finally removed, were left unattended in lockup cells not equipped with restraints.

The record is replete with examples of inmates upon whom untold suffering was visited as a result of these deficiencies.[5] These examples provide graphic testimony to the cumulative shortcomings which beset the APS. One inmate, a quadriplegic suffering from a maggot infested wound because of unchanged dressings, was forced to endure approximately 20 additional days after the problem was identified before the wound was cleaned and the dressings changed. Another patient, a geriatric rendered partially incontinent by a stroke, was required to sit day after day on a wooden bench beside his bed so that the bed would be kept clean. He reportedly fell

5. The Report of the Survey Team of the Medical Association of the State of Alabama, filed on January 4, 1973, confirms the appraisal rendered by Dr. Alderete and buttresses the district court's conclusion that the quality of medical care in the APS is inadequate. The report disparages the indiscriminate use of inmate assistants at Draper and characterizes the physical facilities at Holman, Atmore, and Draper as "grossly deficient." The Survey Team offered the following additional observations:

"(1) Cleanliness of the physical facility and of the prisoner's person is imperative but often lacking.

(2) Diet for prisoners is generally substandard; but specifically special diets for sick prisoners are almost non-existent. Food, adequately prepared is, we believe, a great potential contributor to the health of prisoners as well as to their rehabilitation.

(3) There is gross deficiency of isolation facilities for communicable disease within the Prison System.

(4) There is a lack of such preventive procedures as, for instance, an effective immunization program.

(5) The dental care of the prison is quantitatively deficient, although apparently qualitatively good in some areas.

(6) The eye care is at a very low ebb and should be immediately improved, including provision of spectacles and treatment of correctable defects of the eyes."

from the bench and his legs, one of which was subsequently amputated, became blue and swollen. He died one day after the amputation. Because of the unavailability of a surgeon to attend an inmate who had sustained a serious head injury, a doctor was forced to employ towels and clamps to remove the inmate's skull from his brain. One inmate, transferred to Mt. Meigs as an emergency case, was not seen by a doctor until after a lapse of two days. The record contains numerous other examples of inmates who were discharged from facilities as cured or who were dismissed as malingerers, and yet were subsequently discovered to be suffering from an infectious malady or a terminal disease.

The district court found that the pitfalls inhering in the quality of medical care afforded inmates of the APS transgressed the interdictions of the cruel and unusual punishment clause of the eighth amendment. The ameliorative decree ordered that extensive relief be undertaken. In addition to enjoining the APS from, *inter alia*, failing to formulate plans detailing emergency evacuation procedures and sanitation measures to be implemented, failing to provide drugs, eyeglasses and prosthetic devices to inmates in need, and failing to place geriatric inmates in separate uncrowded quarters, the district court ordered the APS to take the following measures: (1) elevate the Mt. Meigs Medical & Diagnostic Center to a quality comparable to that envisioned in the United States Department of Health, Education & Welfare Proposed Revised Regulations for Participation of Hospitals in Medicare Programs; (2) formulate within 90 days a plan detailing the nature and extent of care to be provided at each infirmary facility, including the evaluation and modernization of equipment and medical techniques; (3) conduct a survey of staffing needs and file proposed minimum staffing requirements for each of the institutions; (4) adopt procedures which would facilitate the expeditious administration of treatment to emergency patients and inmates referred to Mt. Meigs, (5) circumscribe the functions unlicensed personnel could per-

form; and (6) ensure that needed medical care be provided to any afflicted inmate.

II

[1] Although not raised by the parties below or in their briefs on appeal, this court, sua sponte, requested opposing counsel to address the issue of whether a three judge court should have been convened to adjudicate the merits of Newman's claims.[6] Since this issue is jurisdictional, we are required to consider it, despite the failure of the parties to introduce it at any previous stage in the litigation. *See* Calero-Toledo v. Pearson Leasing Co., —— U.S. ——, 94 S.Ct. 2080, 40 L.Ed.2d 452, 460 (1974); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 153, 83 S.Ct. 554, 9 L.Ed.2d 644, 652 (1963); Sands v. Wainwright, 491 F.2d 417, 424 (5th Cir. 1973); Johnson v. Netterville, 488 F.2d 394, 395–396 (5th Cir. 1974).

6. Neither the court below nor the parties had the benefit of our decision in Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973), cert. denied, Guajardo v. Estelle, —— U.S. ——, 94 S.Ct. 2403, 40 L.Ed.2d 771 (1974), until after the appeal to this court was perfected. In view of the number of cases involving comparable challenges where the propriety of convening a three judge court was not even addressed, it is understandable that the issue was not briefed until *Sands* was decided. *See* Novak v. Beto, 453 F.2d 661 (5th Cir. 1971) (challenge to conditions of administrative and solitary confinement, including hygiene, medical care, diet, and cell conditions, in Texas Department of Corrections); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971), aff'g. 309 F.Supp. 362 (E.D.Ark.1970) (challenge to racial segregation, forced uncompensated farm labor, trusty system, barracks system, absence of rehabilitative programs, and various conditions of confinement in Arkansas state penitentiary); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (challenge to resort to whipping as a disciplinary measure in Arkansas state penitentiary); Ross v. Bounds, 373 F.Supp. 450 (E.D.N.C.1974) (challenge to failure of North Carolina Department of Corrections to routinely examine black inmates for sickle cell anemia); Landman v. Royster, 333 F.Supp. 621 (S.D.Va.1971) (challenge to various disciplinary measures, including use of bread and water diet, restraining misbehaving inmates with chains and handcuffs in his cell, stripping an inmate and leaving him in unheated cell in solitary confinement, crowding inmates into single solitary cells, in Virginia state penitentiary). *See also* Kersh v. Bounds, 364 F.Supp. 590 (W.D.N.C.1973); Talley v. Stephens, 247 F.Supp. 683 (E.D.Ark.1965).

[2] The relevant portion of the three judge court act, 28 U.S.C. § 2281,[7] stipulates that a court of three judges must be convened when an injunction is sought against "enforcement or execution of such [state] statute or of an order made by an administrative board or commission acting under State statutes, ..." Appellants point to two statutes which authorize the Alabama Board of Corrections to promulgate rules and regulations concerning the sanitation, health and hygiene of the general inmate population, and concerning inmates for whom long term medical confinement is necessary, *see* Code of Alabama, tit. 45, §§ 3, 4 (1959),[8] as support for the conclusion that as in Sands v. Wainwright, *supra*, the state-wide practices under attack must be evaluated by a three judge court. This position, however, has only superficial appeal, and consequently we reject it.

In Sands v. Wainwright, *supra*, the en banc court considered whether challenges to various prison practices, registered in four consolidated cases,[9] were amenable to three judge court jurisdiction. In one of these cases, Baker v. Estelle, petitioners attacked two practices of the Texas Department of Corrections (TDC). Under the first, inmates claimed to have

7. The full text of 28 U.S.C. § 2281 is as follows:
"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

8. The specific language cited by appellants from section 3, delegates the following functions to the Department of Corrections: "To promulgate such rules and regulations necessary to hygiene, sanitation, cleanliness, healthfulness, feeding of prisoners, management and security of all prisons and jails." Section 4 delegates to the Board the authority to govern treatment of tubercular patients and other inmates needing long term hospital detention.

9. The companion cases to Sands v. Wainwright are Baker v. Estelle, Guajardo v. Estelle, and Guajardo v. McAdams. All are reported at 491 F.2d 417 (5th Cir. 1973) (en banc).

been subjected to solitary confinement and loss of good time without requisite due process guarantees, and under the second, prisoners attacked the TDC practice of reading and censoring attorney-inmate correspondence as transgressing the first amendment. Neither the 1953 TDC regulations nor those adopted in 1973 subsequent to the filing of the complaint condoned the specific practices deemed objectionable by Baker. Indeed, he vigorously contended that because of this fact, resort to a three judge court was unwarranted. This court concluded, however, that in the context before it, the distinction between practices and regulations was artificial. The incisive reasoning undergirding this conclusion was articulated by Judge Goldberg as follows:

> "The 'practices' whose enforcement the inmates seek to enjoin are, in reality, the Rules and Regulations of the Texas Department of Corrections, *as applied.* Plaintiffs claim that no particular paragraph or section of those Rules and Regulations—either the 1953 version in effect at the time this litigation was initiated, or the July 9, 1973, version currently in effect—is constitutionally offensive, and that no injunction is sought against any such paragraph or section. *The entire thrust of plaintiffs' argument, however, is that the Rules and Regulations, as a whole and as applied, are constitutionally deficient standing alone. More complete and more specific regulations must be mandated in order to assure that the present 'practices' will not be continued.*" (Emphasis added)

491 F.2d at 428. Thus, the import of our disposition of the claims presented by Baker is that the complaint's failure to explicitly challenge the constitutionality of a specific regulation will not vitiate the need to convene a three judge court, where the relief sought, if granted, would inexorably condemn those promulgated rules and regulations not specifically challenged. Adoption of the contrary view would have been tantamount to sanctioning the resort to semantical and legal artifices, a practice which should be steadfastly abjured.

Contrary to appellants' contention, however, the challenges levelled in this case are fundamentally different from those orchestrated in Baker v. Estelle, and hence the reasoning enunciated therein is inapposite here. Initially, we apprehend a salient qualitative distinction between the pre-punitive confinement disciplinary procedures and mail censorship practices attacked in Baker v. Estelle and the calibre of medical care attacked by inmates of the APS. The practices in Baker v. Estelle had in fact been ordained by the TDC, and, as witnessed by the regulations on administrative confinement at issue in Guajardo v. McAdams, one of the four consolidated cases, were amenable to codification in regulation form. In contrast, the APS is not governed by any uniform practice or procedure in the administration of medical care, beyond the purported uniform practices of neglectful treatment dispensed at the various prison locations throughout the state. Moreover, it is sheer sophistry to suppose that the Alabama Board of Corrections would undertake, for example, to prescribe state-wide the supply of gauze and drugs available to inmates, or the hours during which licensed medical personnel would be available to render treatment, or to mandate the inordinate delays to which emergency patients would be subjected. In this respect, the medical conditions were not susceptible to codification in the form of regulations.

A second difference between the case before us and that presented in Baker v. Estelle, is that here, unlike *Baker*, a decision granting the requested relief will not eviscerate any regulations governing medical care in the APS. Beyond the aforementioned Alabama statutes, which are only of remote significance, no codified statute or regulation will be affected by this litigation.

[3] A final distinction, which underscores the sanctity of the regulations or statutes which must be passed upon by a court of three judges, flows from the axiom that three judge court status is to be determined from allegations appearing on the face of a complaint. And this axiom, in turn, presupposes

that the existence *vel non* of a uniform statewide practice is likewise ascertainable from the pleading stages of the litigation. Thus, in Sands v. Wainwright, *supra*, and the three companion cases, the state conceded that the practices complained of were of state-wide effect and only disagreed with the assertions of constitutional infirmity.[10] In the case before us, the state not only questions the constitutional significance of medical conditions alleged to pervade the APS, but also contests whether in fact any uniform practice exists.

The decision in Sands v. Wainwright, *supra*, comported with what we characterized as a proclivity for a broad interpretation of the language " 'State statute . . . or . . . order made by an administrative board or commission acting under State statutes.' " 491 F.2d at 423. To countenance the application of *Sands* to the instant case would work an unprecedented expansion of the jurisdiction of three judge

10. We acknowledge that the "face of the complaint" rule is not an intractable one, and that this rule may accede to the "jurisdictional command of § 2281." *See* Sands v. Wainwright, *supra* 491 F.2d at 429. Thus, in Guajardo v. Estelle, the district court had recessed proceedings involving a dispute as to the propriety of censoring inmate mail, in order to enable the director of the TDC to present revised regulations to the court. After submission, the court resumed the proceedings, ultimately handing down a decree the effect of which was to modify 8 of the revised 1972 Rules and to strike 4 others. Unlike here, however, the censorship practices challenged in Guajardo v. Estelle were standardized. The retreat in *Guajardo* from the "face of the complaint" rule, being effected merely to enable the TDC to modify its previous procedures, is quite different from the retreat which would be effected by our sustaining appellants' position here. The merits of the censorship issue have been disposed of in Procunier v. Martinez, — U.S. —, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974). Wolff v. McDonnell, — U.S. —, 94 S.Ct. 2963, 41 L.Ed.2d — (1974), disposes of the due process questions raised in the consolidated cases.

This final distinction is supported by our decisions in Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) and NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974). These two cases involved challenges to discriminatory hiring practices of the Mississippi and Alabama Highway Patrols. There, as in this case, however, the existence *vel non* of a uniform hiring practice was hotly contested, and could be established not on the face of the complaint, but by resort to lengthy evidentiary hearings.

courts and would erode the customarily constrictive view of three judge court jurisdiction which the Supreme Court has mandated. *See* Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577, 591 (1974); Bd. of Regents v. New Left Education Project, 404 U.S. 541, 545, 92 S.Ct. 652, 30 L.Ed.2d 697, 702 (1972); Phillips v. United States, 312 U.S. 246, 251, 61 S.Ct. 480, 85 L.Ed. 800, 805 (1941). Accordingly, we conclude that this litigation was appropriately disposed of by a single judge district court.

III

In addition to challenging the district court's conclusion that the quality of medical care violated the eighth amendment, appellants assign as error numerous evidentiary rulings rendered below.[11] We have examined these rulings and find them to be compatible with F.R.Civ.Pro. 43(a)[12] and the broad

11. The assigned evidentiary errors were as follows: (1) admitting Proposed Revisions of Regulations Covering Participation of Hospitals in Medicare, The Standards of the Joint Commission on Accreditation of Hospitals, and Standards of the Alabama Board of Health into evidence solely to the extent they reflect acceptable minimum standards for operation of a hospital; (2) admitting income tax returns of part-time prison physicians retained by APS into evidence for purpose of showing the distribution of sources of each physician's income; (3) admitting the expert medical testimony of Dr. Joseph Alderete as to the adequacy of treatment when such testimony was based on personal inspections, sworn answers to depositions, and hospital records; (4) attributing minor significance to a comparison between a field hospital in Atlanta and Mt. Meigs, because the facilities are not comparable; (5) considering and admitting evidence of the absence of treatment for the mentally ill as germane to the issue of the adequacy of medical care, the latter of which alone was explicitly raised in the pro se complaint.

12. F.R.Civ.Pro. Rule 43(a) provides in relevant part that:
"All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. *In any case, the statute or rule which favors the reception of the evidence governs.* . . . " (Emphasis added)

discretion extended in an equitable proceeding to a judge acting in his capacity as chancellor. *Compare* Castilleja v. Southern Pacific Co., 445 F.2d 183, 186 (5th Cir. 1971), *and* Butler v. Southern Pacific Co., 431 F.2d 77, 79 (5th Cir. 1970), cert. denied, 401 U.S. 975, 91 S.Ct. 1196, 28 L.Ed.2d 325 (1971), *with* Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 394–395 (5th Cir. 1961). Hence, we proceed to consider whether the finding of a constitutional violation can be sustained.

[4] As appellants vigorously maintain, and as the district court acknowledged, courts must be wary to avoid obtrusively monitoring the conduct of prison officials and thereby encumbering the administration of prison affairs. This court has been sedulously mindful of its circumscribed role, *see, e. g.*, Campbell v. Beto, 460 F.2d 765, 767 (5th Cir. 1972); Sinclair v. Henderson, 435 F.2d 125, 126 (5th Cir. 1970); Schack v. State of Florida, 391 F.2d 593, 594 (5th Cir.), cert. denied, 392 U.S. 916, 88 S.Ct. 2080, 20 L.Ed.2d 1376 (1968), and the foundation to which this role is pinioned. The underpinnings of judicial deference were recently articulated in Procunier v. Martinez, —— U.S. ——, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224, 235 (1974) by Mr. Justice Powell:

> "Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems

of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree."

[5] At the same time, however, this court has been cognizant of the fact that deference which shields officials engaging in intemperate action and which excuses judicial myopia is incompatible with our role as arbiters of the Constitution [13] and hence cannot be countenanced. Thus, while obedient to our limited function in passing upon prison complaints, we have not been impervious to the need to fetter prison officials where constraints are constitutionally appropriate. For example, in Jackson v. Godwin, 400 F.2d 529, 535 (5th Cir. 1968), we remonstrated that once an individual is incarcerated, "any further restraints or deprivations in excess of that inherent in the sentence and in the normal structure of prison life should be subject to judicial scrutiny." And we amplified these concerns in Campbell v. Beto, 460 F.2d 765, 768 (5th Cir. 1972), observing that:

> "Whatever may be the outer contours of the 'prison discipline rule', it is apparent that the courts cannot close their judicial eyes to prison conditions which present a grave and immediate threat to health or physical well being . . . If 'the deprivation of basic elements of hygiene' has consistently been held violative of constitutional guarantees . ., then certainly practices which result in the deprivation of basic elements of adequate medical treatment, particularly such deprivation as immediately threatens life and limb, would be equally vulnerable." (citations omitted).

13. The cases are legion which recognize that prisoners do not lose all their constitutional rights when they pass through the jailhouse door. *See, e. g.*, Wolff v. McDonnell, — U.S. —, 94 S.Ct. 2963, 41 L.Ed.2d — (1974); Courtney v. Bishop, 409 F.2d 1185, 1187 (8th Cir. 1969); Jackson v. Bishop, 404 F.2d 571, 576 (8th Cir. 1968); Johnson v. Anderson, 370 F.Supp. 1373, 1379 (D.Del.1974); Diamond v. Thompson, 364 F.Supp. 659, 662 (M.D.Ala.1973); Collins v. Schoonfield, 344 F.Supp. 257, 264 (M.D.Md.1972); Jones v. Wittenberg, 323 F.Supp. 93, 98 (N.D.Ohio 1971).

Underlying the reasoning articulated in these two cases is the conviction that deference should be tendered only as to those necessary or essential concomitants of incarceration, *see* Sinclair v. Henderson, 435 F.2d 125, 126 (5th Cir. 1970); Edwards v. Duncan, 355 F.2d 993, 994 (4th Cir. 1966); Newkirk v. Butler, 364 F.Supp. 497, 501 (S.D.N.Y.1973). While limited mobility, for example, may be endemic to confinement, forcing inmates to endure severe infirmities without treatment for the duration of confinement is not. In conjunction with this reasoning, there has been a proliferation of decisions in which the fact that incarceration disables an inmate from procuring aid and creates total dependency upon the state for treatment has been seized upon as a justification for judicial scrutiny of prison medical practices. *E. g.*, Fitzke v. Shappell, 468 F.2d 1072, 1076 (6th Cir. 1972); Mills v. Oliver, 367 F.Supp. 77, 79 (E.D.Va.1973); Sawyer v. Sigler, 320 F.Supp. 690, 696 (D.Neb.1970); Ramsey v. Ciccone, 310 F.Supp. 600, 604–605 (W.D.Mo.1970); *cf.* United States ex rel. Fear v. Rundle, 364 F.Supp. 53, 61 (E.D.Pa.1973).

[6] Of course, neither the diminished need to defer on matters of inmate medical care to judgments of prison officials nor the heightened need to vouchsafe the interests of inmates can attenuate the requisite showing of a constitutional infirmity which triggers judicial disapprobation. The district court concluded that medical conditions in the APS transgressed the eighth amendment's prohibition against cruel and unusual punishment. Numerous other courts have anchored their decisions to this provision. *See, e. g.*, Nelson v. Heyne, 491 F.2d 352, 354–356 (7th Cir.), cert. denied, —— U.S. ——, 94 S.Ct. 3183, 41 L.Ed.2d —— (1974); Martinez v. Mancusi, 443 F.2d 921, 924 (2d Cir. 1970); Holt v. Sarver, 442 F.2d 304, 308 (8th Cir. 1971); aff'g, 309 F.Supp. 362, 372–373 (E.D.Ark.1970); Coppinger v. Townsend, 398 F.2d 392, 393 (10th Cir. 1968); Ramsey v. Ciccone, *supra*, 310 F.Supp. at 605. An equally satisfactory constitutional repository is the due process clause. *See* Fitzke v. Shappell, *supra*; Inmates of

Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676, 688 (D.Mass.1973), aff'd, 494 F.2d 1196 (1st Cir. 1974). Under either of these rubrics,[14] however, the challenge to the district court's conclusions of law cannot be sustained.

As was noted, the most critical shortage in the APS is of qualified medical personnel. In Campbell v. Beto, *supra*, 460 F.2d at 769, we characterized as serious the allegation that the Texas Department of Corrections failed to provide a full-time doctor at the Wynn Unit and employed, instead, unlicensed individuals to diagnose ailments and prescribe medicines. *See also* United States ex rel. Fear v. Rundle, *supra*, 364 F.Supp.

14. Various catch-phrases have been employed to demark the point at which judicial deference to prison officials on matters of medical treatment must accede. On occasion, this court has stated that officials are insulated from attack unless the facts reveal an abuse of discretion in failing to provide medical care. *See* Robinson v. Jordan, 494 F.2d 793, 794 (5th Cir. 1974); Schack v. State of Florida, *supra*, 391 F.2d at 594. Those courts which acknowledge the existence of a right to medical treatment, subsumed within the due process guarantees of the fourteenth amendment, *see, e. g.*, Fitzke v. Shappell, *supra*, 468 F.2d at 1076; *cf.* Blanks v. Cunningham, *infra* at 221; Mills v. Oliver, *supra*, 367 F.Supp. at 79; United States ex rel. Fear v. Rundle, *supra*, 364 F.Supp. at 61, are tolerant of some mishaps and require only that "under the totality of the circumstances, adequate medical treatment be administered when and where there is reason to believe it is needed." Mills v. Oliver, *supra*, 367 F.Supp. at 79. Under the cruel and unusual punishment clause of the eighth amendment, courts confine their inquiry *inter alia* to whether conditions of confinement "shock the conscience," are greatly disproportionate to the offense, or offend evolving notions of decency. *See* Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630, 642 (1958); Robinson v. California, 370 U.S. 660, 677–678, 82 S.Ct. 1417, 8 L.Ed.2d 758, 769 (1962) (Douglas, J., concurring); O'Brien v. Moriarty, 489 F.2d 941, 944 (1st Cir. 1974); Novak v. Beto, 453 F.2d 661, 676 (5 Cir. 1971) (Tuttle, J., dissenting), rehearing denied, 456 F.2d 1303 (5th Cir. 1972); Holt v. Sarver, 309 F.Supp. 362, 372–373 (E.D.Ark.1970), aff'd, 442 F.2d 304 (8th Cir. 1971). It appears that the reasoning employed in justifying judicial invalidation of prison practices is as mottled as the varied explications of the cruel and unusual punishment clause proffered in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). We minimize the import of this diversity, however, in view of the catholicity of opinion that the requisite showing consists of evidence of rampant and not isolated deficiencies which due to callous indifference subject inmates to the severe deprivations chronicled in the record below.

at 59; Gates v. Collier, 349 F.Supp. 881, 888, 894 (N.D.Miss. 1972), aff'd, 501 F.2d 1291 (5th Cir. 1974). Clearly, under Campbell v. Beto, *supra*, the widespread use of inmate assistants and M.T.A.'s is suspect. Conversely, the limited availability of qualified personnel poses a problem of constitutional magnitude.

The inexorable nonattention and delays in receiving treatment attributable to personnel shortages, the ill-conceived system for referrals of inmates to Mt. Meigs from other facilities, and the maladroitly operated "emergency" referral system also present grave constitutional problems. This court has repeatedly reversed dismissals of complaints alleging failure to treat or allowing a protracted period of time to elapse before rendering treatment. *See* Campbell v. Beto, *supra*, 460 F.2d at 767 (TDC's refusal to permit inmate to see a doctor until 13th day of confinement in segregated status); Hutchens v. State of Alabama, 466 F.2d 507, 508 (5th Cir. 1972) (allegation of present lack of medical attention and medication, which produces intolerable pain and shortens life expectancy); Hughes v. Noble, 295 F.2d 495 (5th Cir. 1961) (refusal to give needed attention or allow plaintiff to call a physician for 13 hours after he was jailed for driving his car into a ditch, as a result of which he sustained a broken neck). *See also* Fitzke v. Shappell, *supra*; Blanks v. Cunningham, 409 F.2d 220 (4th Cir. 1969); Riley v. Rhay, 407 F.2d 496 (9th Cir. 1969); Mills v. Oliver, *supra*, 367 F.Supp. at 79; Sawyer v. Sigler, *supra*, 320 F.Supp. at 695; Talley v. Stephens, 247 F.Supp. 683, 687 (E.D.Ark.1965); McCollum v. Mayfield, 130 F.Supp. 112, 114–115 (N.D.Cal.1955). Certainly, if the infirmity—lack of attention—is of constitutional magnitude, then the deficiency which spawns the infirmity—lack of available personnel, and ill-conceived emergency and referral procedures—can also be deemed to be of constitutional import. Accordingly, the referral and emergency procedures presently employed cannot withstand scrutiny.

[7] The record also revealed shortages in drug supplies, the unavailability of eyeglasses and prosthetic devices, and the employment of obsolete medical equipment and techniques. Courts will not tolerate serious shortages in medication. *See* Hutchens v. State of Alabama, *supra*, 466 F.2d at 508; Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970). *See also* Thomas v. Pate, 493 F.2d 151, 158 (7th Cir. 1974). Since equally severe harm can be occasioned by the unavailability of eyeglasses and the use of anachronistic and precarious medical techniques and equipment, we should not be any less prone to disparage these deficiencies.

A fourth debility under which the APS was found to labor was the presence of disorganized lines of therapeutic responsibility. An ineluctable by-product of this condition is that treatment prescribed by doctors is not administered by medical subordinates. Since the failure of prison officials to comply with doctors' orders has occasioned judicial disapprobation, *see* Martinez v. Mancusi, *supra*; Sawyer v. Sigler, *supra*, a medical organizational system pregnant with the possibility of noncompliance is similarly amenable to attack.

Finally, the record revealed glaring unhygienic conditions, including the potential for contagion caused by nonsegregated sanitary facilities for the Mt. Meigs general ward population and hepatitis and tuberculosis ward populations, and the facilities in a state of disrepair at Draper and Tutwiler. This court has scrutinized sanitary conditions of facilities and demonstrated its unwillingness to condone the use of such facilities which jeopardize the life or health of inmates. *See* Anderson v. Nosser, 456 F.2d 835 (5th Cir. 1972) (en banc), aff'g in part and reversing in part, 438 F.2d 183 (5th Cir. 1971). *See also* Thomas v. Pate, *supra*; Wright v. McMann, 460 F.2d 126, 131 (2d Cir. 1972); Gates v. Collier, *supra* 349 F.Supp. at 887, 894; Hamilton v. Schiro, 338 F.Supp. 1016 (E.D.La.1970); Jordan v. Fitzharris, 257 F.Supp. 674 (N.D.Cal. 1966).

[8] We acknowledge that the inquiries of this court and the court below have not been free from difficulty. The challenge registered herein is unprecedented in scope. It evokes an evaluation of systemic medical deficiencies. Courts are not as readily equipped to quantify the suffering occasioned by pervasive shortcomings as they are to assess whether a particular inmate has been maltreated. Nevertheless, three factors coalesce, impelling us to conclude that the district court's findings of constitutional inadequacy were not infirm.

First, many of the shortcomings prevalent in the APS have been judicially acknowledged to raise the spectre of constitutional infirmity in cases brought by individual prisoners. Moreover, most of those deficiencies which have not been specifically addressed by other courts but which we deem egregious are causes of conditions which have been abjured. For example, in our view, the causes of non-treatment or delays in treatment should trigger disapproval as strident as that prompted by the fact of non-attention or delay. Second, the pitfalls identified are of such a nature as to render large-scale improvident treatment inevitable. The use of dangerously out-moded equipment and medical techniques threatens the welfare of every inmate upon whom such equipment and techniques are employed. Third, and in conjunction with the latter point, the record is replete with countless examples of inmates who were subjected to incalculable discomfort and pain as a result of the lack of medical care or inadequacy in the treatment administered. These examples fortify the conclusion that deficiencies were not isolated and bespeak of callous indifference to the welfare of inmate-patients. Moreover, these examples also belie any suggestion that suffering resulted merely from legitimate discrepancies of opinion as to the proper treatment to be rendered.

IV

[9] Despite laboring strenuously to comply with the district court's mandates, appellants nevertheless challenge the remedy it devised. The relief ordained, appellants claim, prescribes specific standards of medical care and thereby transgresses the principle that courts should not intrude into matters related to prison administration. But whatever force this argument has derives largely from its generality. For the existence of constitutional infirmities deprives the prison deference rule of its indomitably insulating nature and dictates that the rule yield to the remedial power of a court.

Moreover, far from being intrusive, the measures formulated leave virtually all initiative with the APS while being particularly well tailored to ameliorate the unconstitutional deficiencies acknowledged to exist. Certainly, those aspects of the decree which, for example, enjoin the APS from perpetrating further denials, from failing to file a fire emergency plan, and from failing to elevate sanitary conditions, etc., are not obtrusive or cumbersome. Indeed, it would appear that only 3 provisions of the decree envision pervasive, though necessary, changes. These provisions require (1) the submission of plans for improvement of each facility, (2) the submission of similar plans for staffing at each facility, and (3) the elevation of Mt. Meigs to the standards enunciated in the Proposed Revised Regulations for Participation of Hospitals in Medicare. The former two requirements vest the APS with the initiative in the first instance. The latter requirement, though quite specific, was imposed only when appellants were remiss in submitting proposed standards requested by the court at the termination of the evidentiary hearing.

Moreover, we would note that there is a striking congruity between the relief ordered and various improvements which Dr. Mracek, Medical Director of the APS, desired to implement upon his assumption of duties. This congruity tends to belie the suggestion that the district court intemperately imposed its will upon prison administrators. And Dr. Mra-

cek's merely modest success leaves us less than sanguine that salutary change could be effected without moderate judicial monitoring.

[10, 11] Finally, it is axiomatic that the remedial power of a district court is coterminous with the scope of the constitutional violation found to exist. Appellants' intractable affirmations of incredulity concerning the district court's findings cannot obscure the fact that the deficiencies in the APS are more than mere peccadillos and the quality of medical care conspicuously less than spartan. Consequently, no litany of the prison deference rule can vitiate the district court's duty to fashion a remedy commensurate in scope with that of the infirmities discerned. We conclude that the district court acted well within its province in adopting the measures with which the APS has, heretofore, laudably complied. *See* Holt v. Sarver, *supra*; Inmates of Suffolk County Jail v. Eisenstadt, *supra*, in which courts ordered that extensive steps be taken to rectify medical or hygienic deficiencies.

V

To reiterate, we hold that Sands v. Wainwright, *supra*, does not compel the convening of a three judge court, that no evidentiary errors were committed below, and that the district court's finding of a constitutional violation can be sustained.

It is not without some trepidation that we uphold the finding of a constitutional violation. Officials in the APS are shackled by anachronistic equipment, inadequate staffing, and parsimonious funding, factors which render Sisyphean their task of insuring that adequate medical care is available to inmates.

[12] By the same token, however, we cannot be impervious to the precarious position of inmates who, though dependent solely on a prison for medical attention, find their pleas for aid unheeded. Deep-seated inmate frustrations can be exacerbated by a perceived callous indifference to their medical

plight. The incidence of frustration thwarts the purported goal of rehabilitation, which itself has not been immune from attack, *see, e.g.*, Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 1st Sess. ser. 18, pt. 4, at 50 (1971) (testimony of Dr. Seymour Halleck); Kastenmeier & Eglit, Parole Release Decision-Making: Rehabilitation, Expertise, & the Demise of Mythology, 22 Am.U. L. Rev. 477, 496 (1973); Kaufman, Prison: The Judge's Dilemma, 168 N.Y.L.J. 4 (1972), and thereby jeopardizes the ability of inmates to assimilate into the population at large when ultimately released. While it is not our function to expect or demand alchemy of prison officials, it is our role to ensure that the plight of inmates is not constitutionally forsaken. Fidelity to this role commands that the judgment of the district court be affirmed as herein indicated. The Eleventh Amendment issue as to the award of attorneys' fees and expenses will be decided by the court en banc.

Affirmed in part.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

UNITED STATES COURT OF APPEALS
FOR FIFTH CIRCUIT
OCTOBER TERM, 1973

No. 73-2033

D. C. Docket No. CA 3501-N

N. H. NEWMAN, et al.,

Respondents-Appellees,

versus

STATE OF ALABAMA, BILL BAXLEY, Attorney General for the State of Alabama,

Petitioners-Appellants,

UNITED STATES OF AMERICA,

Amicus Curiae.

Appeal from the United States District Court for the Middle District of Alabama

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed in part in accordance with the opinion of this Court. The Eleventh Amendment issue as to the award of attorneys' fees and expenses will be decided by the Court En Banc;

It is further ordered that petitioners-appellants pay to respondents-appellees, the costs on appeal to be taxed by the Clerk of this Court.

November 8, 1974

Issued as Mandate:

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

EDWARD W. WADSWORTH 600 Camp Street
Clerk New Orleans, La. 70130

OFFICE OF THE CLERK

January 10, 1975

TO ALL COUNSEL OF RECORD

No. 73-2033 NEWMAN V. STATE OF ALABAMA

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH
Clerk
By: ANNE G. PARENT
Deputy Clerk

cc: Mr. William J. Baxley
Mr. Herbert H. Henry
Messrs. George Beck
Thomas Sorrells
Mr. Joseph Phelps
Mr. Philip Butler
Mr. Michael S. Loftman
Mr. Ira DeMent
Mr. J. Stanley Pottinger
Ms. Patricia G. Littlefield
Mr. Walter W. Barnett

APPENDIX B

1. Title 28, United States Code, § 1254(1)
   Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
   (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

2. Title 28, United States Code, §2281
   An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

3. Title 45, Section 3, Code of Alabama, 1940:
   The functions and duties of the department shall be: To manage, supervise and control all penal and correctional institutions, except as otherwise herein provided. To sell, distribute, process, or otherwise dispose of all farm products, livestock, or poultry raised, or articles, goods, or wares made or manufactured by use of labor or machinery under the control or supervision of this department, or any personal property not needed. To inspect as often as may be deemed necessary every county jail and every municipal jail or prison in any incorporated town or city in this state having ten thousand or

more population, according to the last federal census, and to aid in securing the just, humane, and economic management of all such institutions; to require the erection of sanitary buildings for the accommodations of the inmates of such institutions, to investigate the management of all such institutions and the conduct and efficiency of the officers or persons charged with their management. To promulgate such rules and regulations necessary to hygiene, sanitation, cleanliness, healthfulness, feeding of prisoners, management and security of all prisons and jails. To supervise the employment of prisoners within or without the walls or enclosures of all state prisons and other state institutions housing persons convicted of crime except prisoners in mental hospitals and asylums. To collect statistics and to make a detailed report to the governor annually or at such other time as the governor may require, concerning the condition of any or all prisons and jails and the inmates thereof. To cooperate with any court having criminal jurisdiction in the administration of any law with respect to parole or probation. To cooperate with the state department public welfare in the discharge of any duties and functions which may be delegated by law to such department with reference to persons committed to state penal institutions, and with reference to families or children of such persons who may be in need of public welfare services or assistance.

The department shall be charged with the duty and responsibility of cooperating with all boards, agencies, and institutions relating to the administration, operation, supervision, and control of other penal and correctional institutions of the state in the per-

formance of any of the functions and duties delegated to them by law. The department shall specifically be charged with the duty and responsibility of cooperating with the department of public welfare in the discharge of its duties with reference to the families or children of prisoners who may be in need of public welfare services or assistance. If any man or woman committed to a prison or penitentiary is, at the time of commitment, the parent of a child or children under sixteen years of age, and such child or children need the care and protection of the state, it shall be the responsibility of the department when advised of such need to call it to the attention of the state department of public welfare. In the event the governor declares that an emergency exists whereby it is necessary to discontinue the manufacture of articles, goods, or wares by convict labor on account of the lack of a profitable market for the disposition of said articles, goods, or wares, there is hereby appropriated for the fiscal years 1941, 1942 and 1943 out of the general fund of the state of Alabama, a sum not to exceed three hundred and fifty thousand dollars per annum for the use of the department of corrections and institutions to be used for the purposes set out in this section. No part of said fund hereby appropriated shall be used without the written approval of the governor.

4. Title 45, Section 4, Code of Alabama, 1940)
The state department may also make such changes in the existing arrangements with reference to the segregation and treatment of tubercular patients, and other patients needing long time hospital de-

tention and care, who are serving sentences for conviction of crime, so as to permit such patients to be transferred to the custody and care of those officers and agents who have the charge and control of the detention hospital or hospitals of the state convict system; the agents in charge of such of such hospital or hospitals during the period of the treatment of such convict patients are constituted the legal custodians of such convicts. Any such hospital or hospitals, or other places suitable and used under the convict system for the segregation and treatment of tubercular or long time patients may be opened under the authority of the state department and may be used for the segregation, treatment and care of other inmates afflicted with tuberculosis or other diseases or ailments requiring long time detention, treatment and care, and who may be received from any other institution covered by this article, or from any hospital or other duly accredited and responsible institution in the state with which the state department may co-operate in the matter of the treatment or care of such patients. There shall be proper separation of convicts from free persons, whites from blacks, males from females, in such hospital or place of detention. The department is given general authority over the reception, care, custody and segregation of such persons, and is also vested with the power and authority, by and with the approval of the governor, to establish and promulgate rules and regulations for the proper conduct of the business and operation of such hospitals and places of detention, except as may be otherwise provided by this article.

5. Rule 43(a), Federal Rules of Civil Procedure, Title 28, United States Code:

> (a) In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

CERTIFICATE OF SERVICE

I, Walter S. Turner, Chief Assistant Attorney General of Alabama, one of the attorneys for the State of Alabama, Petitioners, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this _____ day of March, 1975, I did serve the requisite number of copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on each of the Attorneys for the Respondent, by mailing the same to them, first class postage prepaid and addressed to them as follows:

Mr. Joseph Phelps
Attorney at Law
P.O. Box 612
Montgomery, Alabama 36104

Hon. Ira DeMent
U.S. Attorney
Federal Courthouse
Montgomery, Alabama 36104

Ms. Patricia G. Littlefield
Attorney, Civil Division
U.S. Dept. of Justice
Washington, D.C. 20530

Walter S. Turner

WALTER S. TURNER
Chief Assistant Attorney General of Alabama

Address of Counsel:
Attorney General's Office
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36104